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DEPARTMENT NOTES.

Election of Professor Mikell, December 2, 1902.—William E. Mikell, assistant professor in the Law Department of the University of Pennsylvania from 1899 to 1902, has been appointed a full professor in the department. Born in Sumter, South Carolina, to which state his ancestors came from England in 1682, Mr. Mikell was educated in the South. He was graduated from the Military Department of the University of South Carolina in 1890, with the degree of Bachelor of Science, afterwards taking a special course in law at the University of Virginia, under the eminent John B. Minor. In 1894 he was admitted to the bar of South Carolina, but two years afterwards came to Philadelphia and engaged in legal work. In 1897 he was appointed instructor in law. Since that time he has devoted himself entirely to his work in the Law School. In 1899 he was appointed assistant professor and took charge of the courses in

Criminal Law and Blackstone's Commentaries. In 1902 he was given charge of the course on Contracts of the second year. Mr. Mikell has recently published the first part of a compilation of Cases in Criminal Law; the second part is now being issued.

Resignation of Professor Carson, March 3, 1903.—Hampton L. Carson, LL. D., resigned his professorship March 3, 1903; he having accepted in January the appointment as attorney-general of the state of Pennsylvania. Mr. Carson was elected professor of law in 1895. From the fall of 1896 until the spring of 1900 he conducted the courses in Contracts. At this time the increasing pressure of his private practice compelled him to ask for a leave of absence. This was granted in the expectation that he would be able to return and take up his duties in the department. His appointment as attorney-general prevented the fulfillment of this expectation. His resignation was, therefore, accepted by the trustees, with expressions of regret and also with congratulations on his appointment.

Mr. Carson was born in Philadelphia about fifty years ago. He was educated in this city, being graduated from the College and the Law Department of the University of Pennsylvania. He immediately entered into the active practice of his profession and soon became well known for his ability as a lawyer and his eloquence as an orator. He has had a most varied practice, criminal as well as civil. For many years he was an active member of the law firm of Jones, Carson & Beeber. He is the author of the well known "History of the Supreme Court of the United States," and has also made many valuable contributions to the periodical literature of the law, notably the articles which have appeared from time to time in the pages of this review.

As an orator Mr. Carson has long been eminent, and has been called upon for addresses not only upon legal topics, but on occasions of historical and social importance. He has delivered addresses before many bar associations, and at college commencements. At Lafayette College, where he delivered the commencement oration in 1898, the degree of LL. D. was conferred upon him.

At the opening of the Law School Building in 1900 he delivered the dedicatory oration for Price Hall. He has been a most generous friend to the Biddle Library, to which he has donated a large number of valuable books.

RAILROADS—REGULATION BY STATE—ABROGATION OF COMMON-LAW RULE AS TO FELLOW SERVANTS—VALIDITY OF CONTRACT EXEMPTING FROM LIABILITY UNDER IOWA STATUTE.—*O'Brien* v. *Chicago & N. W. Ry. Co.*, 116 Fed. Rep. 502 (Circuit Court, N. D. Iowa, C. D. June, 1902). This is a case decided under Sections 2071 and 2074 of the Iowa State Code and Chap-

ter 49 of the Acts of the 29th General Assembly, Section 2071, headed, "Liability for Negligence or Wrongs of Employes," which provides substantially, that every corporation operating a railway in the state of Iowa shall be liable for damages sustained by any person, including employes, and "no contract which restricts such liability shall be legal or binding."

Section 2074, headed, "Contract or Rule Limiting Liability," provides substantially that no contract shall exempt any railway company from the liability which would exist had no contract been entered into.

Chapter 49 of the Acts of the 27th General Assembly amends Section 2071 of the Code by adding the provision that no contract of indemnity entered into prior to the injury, between the person injured and such corporation, shall constitute a bar to an action brought under the provisions of this section.

This action was brought by the personal representative of an "express messenger" killed in an accident brought about through the negligence of the defendant company's employes. Upon entering the employ of the express company the deceased had signed an agreement exonerating the company from liability for any injuries which might be sustained by him while in the employ of the company. By virtue of the contract between the express company and the railway company, this agreement had accrued to the benefit of the defendant company.

Upon demurrer the question arises whether this agreement is a legal bar to the right of action declared on by plaintiff, and, in view of these legislative enactments, it was held by Judge Shiras, judge of the 8th U. S. Circuit, Northern District of Iowa, that it was not.

The case is important as deciding: (1) The right of a state through whose legislative consent alone a railroad company derives the right to construct and operate a railroad within its territory, to attach to such consent conditions for the protection of the lives of its citizens, though employes of the railroad, and as one of such conditions, to abrogate as to railway companies, by a general law applicable to all companies operating roads within the state, the common law rule which exempts a master from liability for injuries resulting from negligence of fellow servants.

(2) The validity of a contract exempting from such liability under the Iowa statute.

On the authority of *Railway Co.* v. *Voight,* 176 U. S. 498, 1900, it is settled that one occupying the position of an express messenger, under the circumstances surrounding deceased at the time of his death, cannot be considered a passenger, but occupies the position of an employe of the railway company. In this case it was said: "That the relation of the express messenger to the transportation company . . . seems to us to more

resemble that of an employe than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business, the transportation and delivery of express matter. His duties of personal control and custody of the packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employe of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants." The question therefore turns upon the operation of the statute. In his opinion Judge Shiras says: "The right to conduct and operate a railroad by the agency of steam in the state of Iowa is derived from the legislation of the state, and in conferring this right and providing for the mode of its exercise, the state has the right to make such provisions as it deems best to secure the safety of the life and limbs of those who may be subject to risk through the operation of the railways of the state." This right has been frequently recognized by the legislatures of other states and their statutes have been similarly interpreted by the courts. *Coley* v. *North Carolina Railway Co.*, 40 S. E. 195, 1901; *Missouri Pacific Railway Co.* v. *Mackey* (Kan.) 127 U. S. 205, 1887; *Minneapolis & St. Louis Railway Co.* v. *Herrick* (Iowa), 127 U. S. 210, 1887; *Chicago, Kansas & Western Railroad Co.* v. *Pontius* (Kan.), 157 U. S. 209, 1894. These cases thoroughly discuss the constitutionality of such statutes and decide it in the affirmative. In *Railroad Co.* v. *Mackey* (*supra*), the court said: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objection therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular need, and all railroad corporations are, without distinction, made subject to the same liabilities."

In another part of the same decision it is said: "When legislation applies to particular bodies or associations a law imposing upon them additional liabilities, is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same circumstances." Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, public morals and public safety, in the same sense as are all contracts, and all property, whether owned by natural persons or by corporations: *St. Louis & San Francisco Ry* v. *Mathews,* 165 U. S. 1, 1896; *Slaughter-house Cases,* 16 Wall 36, 1872; *Patterson* v. *Kentucky,* 97 U. S. 501, 1878; *New*

Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650, 1885; *New Orleans Waterworks* v. *Rivers*, 115 U. S. 674, 1885. The power of a state to so regulate contracts of this nature is not questioned. The state, for the protection of the property of its citizens, having the right to impose upon railway companies liability for injury to such property resulting from the operation of their trains, it would seem that certainly it must have the right to throw a like protection around the life and limb of its citizens. The rule of the common law, as it is said in *Hough* v. *Railway Co.*, 100 U. S. 213, 1879, is based upon the proposition that, "it is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those at least in the same work or employment, with whose habits, conduct and capacity he has in the course of his duties an opportunity to become acquainted, and against whose negligence or incompetency he may himself take such precautions as his inclination or judgment may suggest." This rule of common law was formulated in connection with the ordinary business vocations of life, long prior to the introduction of railroads and their extensive and complicated systems of employment; when from personal contact with his fellow employes, an employe had a better opportunity to judge their competency and carefulness than was possessed by the master; and such employe had an opportunity to protect himself against the dangers resulting from their carelessness, either by complaint to the master or by taking the precautions rendered necessary by the actions of his co-employes. For these reasons the rule is perfectly just when applied to the ordinary employments out of which it had its birth. But when the employe is one of thousands, most of whom he has never seen, and where he can have no opportunity to judge of their competency and carefulness, when the slightest act of negligence of a fellow employe may put his life in jeopardy, as is the case in a great modern railway system, the reasons which were the cause of the common law rule can hardly be said to apply.

We come now to an examination of the contract exempting the railroad company from all liability under the Iowa statute.

Judge Shiras says: "The Supreme Court in the *Voight* case (*supra*), held that such messengers were not passengers upon the railway trains, but rather occupied the position of employes of both companies. If such is their legal position, then, being an employe of the railway company, the messenger clearly comes within the spirit as well as the language of Section 2071, and the railway company is made liable to him for the consequence of the neglect or mismanagement of the employes of the company in the operation of the railway." In *Coley* v. *North Carolina Railway Co.* (*supra*), the court said: "It is well settled that the

doctrine of fellow servants and assumption of risk rests entirely upon an implied contract; and if an express contract could be made to take the place of the implied contract the essential purpose of the act could be defeated."

In most of the states of the Union, a railroad as a common carrier may not contract against liability for negligence (see *Fetter on Carriers,* § 398; *R. R. Co.* v. *Lockwood,* 17 Wall. 357, 1873; *Farnham* v. *Camden & Amboy Railroad Co.,* 55 Pa. State 53, 1867). The doctrine of these cases, like that of the case under consideration, is primarily, public policy. "Whatever difference of opinion may exist as to the extent and boundaries of the public power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizen . . . The legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex,* and are to be attained and provided for by such appropriate means as the legislative discretion may devise." *Beer Co.* v. *Moss.,* 97 U. S. 25, 1877. "Whether a contract shall be avoided on the ground of public policy does not depend upon the question whether it is beneficial or otherwise to the contracting parties. Their personal interests have nothing to do with it; but the interest of the public alone, is to be considered. The state is interested not only in the welfare, but in the safety of its citizens. To promote these ends is a leading object in the government. Individuals are left to make whatever contracts they please, provided no legal or moral obligation is thereby violated, or *any public interest impaired;* but when the effect or tendency of the contract is to impair such interest, it is contrary to public policy and void." *Smith* v. *New York Central Railroad Co.* (*supra*).

The power of the state to impose restraints and burdens upon persons and property in promotion of the public health, good order and prosperity, is a power always belonging to the states, not surrendered by them to the general government, and essentially exclusive. By statutory enactment in Iowa it has been declared to be the public policy of the state that corporations engaged in railway business in that state cannot, by contract, free themselves from the liability attaching to them as carriers of passengers and property; that they are liable to every person, including their own employes, for injuries resulting from their neglect; and that such liability, so imposed on the railway companies, cannot be evaded through any contract of insurance, benefit or indemnity entered into prior to the injury complained of. "In the face of these provisions of the state statutes," says Judge Shiras, "it is impossible to give any force or validity to the contracts relied on by the defendant in this case. Their clear pur-

pose is to attempt to free the railway company from the liability the state has seen fit to impose upon it in the conduct of its business in Iowa, and which the state statutes declare cannot be avoided by contracts entered into in violation of the provisions of the statutes, and it must be held that the clauses of the contract which are intended to free the company from liability for injuries caused by the negligence of the company or of its employes to express messengers, when engaged in their duties upon the company's trains in Iowa, are invalid."

In accord, see *Railroad Co.* v. *Pontius* (*supra*); *Railway Co.* v. *Mackey* (*supra*); *Railway Co.* v. *Herrick* (*supra*); *Railroad Co.* v. *Mathews,* 168 U. S. 7, 1897.

I. G. G. F.